Filed 11/25/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALBERTO GALVAN et al., Defendants and Appellants.	E042254 (Super.Ct.No. RIF116172) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed as modified and remanded for further proceedings.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Alberto Galvan.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant Jose Roberto Zaiza.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.110.1, this opinion is certified for publication with the exception of parts II, III, and IV.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendants Jesus Alberto Galvan (defendant Galvan) and Jose Roberto Zaiza (defendant Zaiza) were convicted of attempted murder (Pen. Code, §§ 187, subd. (a), 664[1]), torture (§ 206), burglary (§ 459), and active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found that defendants personally caused great bodily injury (§ 12022.7, subd. (b)). The trial court found that defendant Zaiza had a prior strike conviction within the meaning of section 667. The trial court sentenced defendant Galvan to a term of life with the possibility of parole (minimum serving period of 15 years), plus a consecutive term of five years. It sentenced defendant Zaiza to a term of life with the possibility of parole (minimum serving period of 30 years), plus a consecutive term of five years.

Both defendants appeal.

I. PROCEDURAL BACKGROUND AND FACTS

A. The Prosecution's Case

Mukesh Patel (Mukesh) operated the Brazil Market, a mini-mart, on Chandler Street in Corona.[2] The incident in question occurred at the mini-mart. He was working

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Some of the witnesses called the area Eastvale.

[footnote continued on next page]

with two other employees, Meena Patel (Meena) and Victor Ladino (Ladino). Aurelio Lobato (Lobato) was working at Tacqueria Amigos, a business adjacent to the Brazil Market.

Around 8:00 p.m. on February 28, 2004, two men[3] were trying to open the door of a pickup truck with a flat piece of metal. One of the men had locked his keys inside the truck while it was parked in front of the Brazil Market. Three or four men approached one of the two men[4] and began beating him, first hitting him in the face and then knocking him to the ground and kicking him. The man's face was injured and he was bleeding from the nose.

Lobato told the men to stop. Some of the men, later identified as defendants, began to chase Lobato, who had emerged from Tacqueria Amigos. Lobato ran into the Brazil Market and defendants followed. Lobato told Meena, who was behind the counter, to call 911. Lobato ran down the aisle as the men followed. They were knocking over a shelf and throwing items. Defendants grabbed Lobato, pushed him to the ground, and dragged him to the back of the store near the back entrance. They started hitting and kicking Lobato, who was lying on the ground trying to shield his face and head with his hands. Lobato identified both defendants as his attackers.

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[3] The men were later identified as Mario Montoya and Jorge Gonzales.

[4] The other man ran away.

Fidel Chavez (Chavez), a 51-year-old baker who was delivering bread to the store, yelled at defendants to leave Lobato alone. Defendants chased after Chavez, grabbing and throwing him to the ground and then beating and kicking him. Simultaneously, Ladino ran from the store. Lobato locked himself inside the beer cooler and hid. He had scrapes and abrasions on his face and lost several teeth as a result of the beating. Defendants continued to beat and kick Chavez after he was lying defenseless on the ground.

Eventually, Meena heard Ladino scream and found him in the back room of the mini-mart trying to help Chavez, who was bleeding and unconscious. Meena called 911. Mukesh tried to stop Chavez's bleeding with towels.

When the first Riverside County Sheriff's Department deputy arrived, he heard screams coming from the market and found Chavez inside lying in a pool of blood. Chavez was not breathing. He had a large gash on the side of his head and a large laceration under one eye. He was bleeding heavily. The deputy applied pressure to stop the bleeding until paramedics arrived.

Dr. Michael Bear treated Chavez at Corona Regional Medical Center. Chavez was unconscious and unresponsive upon arrival. He had no response to painful stimuli and no gag reflex. His pupils were unresponsive to light and he had fluid in his lungs. He was treated to restore his airway.

The Glasgow Coma Scale is used to measure the level of brain impairment. A normal score is 15; at the hospital, Chavez scored a three, the lowest possible score.

Chavez suffered a seizure before arriving in the emergency room and another after he arrived. The seizure started in his right arm and progressed to his right leg before spreading to the rest of his body, indicating a probable injury to the left side of his brain. He was given medication to control the seizures. Chavez had a laceration over his right ear and another near his left eyebrow. There were a scrape and abrasion below his left eye and bruises on his face and left shoulder. Chavez's condition was "very grave." If he had not received prompt medical attention, he would have died from the injuries. He was transferred to a trauma center.

Chavez remained in a coma for more than a week and was in intensive care during that time. He was hospitalized for several weeks. He required stitches above the eye and 30 to 35 staples to the side of his head. He also had bruising to his right side. Chavez does not remember the attack. Cynthia, his daughter, testified that her father is no longer able to function independently. He cannot drive, suffers from memory loss, and is no longer able to run his business.

Ladino told Detective Gary Bowen that he knew Chavez's assailants from the neighborhood. Ladino accompanied a sheriff's deputy to a house near Chandler and Sebly. He told police that one of the defendants lived at 14519 Chandler Avenue. Two of defendant Zaiza's cousins, Benjamin and Francisco Sandoval, lived at that address. The Sandovals were admitted members of the Mira Loma Young Crowd, a street gang. They were also identified as having been in front of the Brazil Market at the time of the attack. Using a photographic lineup, Ladino identified defendants as two of the men

involved in the incident.[5] At trial, Ladino recalled the person whom he identified from a photographic lineup as one of the suspects who hit the man by the truck. He also recalled the person whom he identified from a photographic lineup in People's exhibit No. 54 was one of the defendants who followed Lobato into the store. However, Ladino denied that he identified the defendants in People's exhibit Nos. 53 and 54 as the persons who had hit and kicked Chavez. He denied seeing anyone beating Chavez, claiming that he had already run away. He also denied telling the police that he had seen the defendants before or that he had led the police to the home of one of the defendants. He admitted being somewhat fearful of retaliation for his testimony.

In a taped interview with Detective Eric Holland, defendant Galvan admitted that he was at the Brazil Market when the attack took place. Defendant Galvan said that earlier that day, two men were walking down Chandler Avenue and one threw a beer bottle into the street. Defendant Galvan said he considered that an act of disrespect. Later that day, defendant Galvan saw the same men in front of the Brazil Market near a red pickup truck. He thought the men were trying to "jack" the vehicle. Defendant Galvan said that he confronted the two, and one of them hit him in the back of the head and struck him in the shin and shoulder with a metal bar. He did not call the police.

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[5] However, during trial, Ladino did not recall pointing out a house or identifying defendants as the assailants. On the day following Ladino's testimony, the interpreter testified that defendant Galvan was looking at Ladino in an intimidating manner. Ladino acknowledged that he was fearful.

Defendant Galvan claimed to have gone into the mini-mart but not the back storeroom. He also claimed that he did not see the older man who was beaten there.

At trial, Lobato identified defendants as the two men who assaulted all of the victims. He admitted that he told police at the time of the incident that the attack happened so fast that he would not be able to identify his attackers either in person or by picture. He was never shown any photographs or asked to make an identification of his attackers before the trial. He testified that he had never seen them before the attack.

B. Predicate Crimes/Gang Testimony

On January 17, 2004, Francisco Alvarado was assaulted at a house party on Urbana Street in Mira Loma. As Alvarado was leaving the party, he saw some men beating his cousin, Jovanni Soto. The group was kicking and hitting Soto repeatedly while he was lying on the ground unable to defend himself. When Alvarado asked why Soto was being assaulted, defendant Zaiza hit Alvarado with a pistol, knocking him unconscious. The group then kicked and beat Alvarado while he was lying on the ground. The police were called and the group fled. Alvarado suffered several puncture wounds, a large head laceration and a torn earlobe. Alvarado identified defendant Zaiza from a photographic lineup.[6] A videotape taken at the party confirmed defendant Zaiza's presence at the scene before the attack. Alvarado watched the videotape with detectives and pointed out defendant Zaiza as the man who hit Alvarado with the gun.

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[6] Alvarado identified defendant Zaiza in court based on memory of Zaiza's tattoo.

Riverside County Sheriff's Department Corporal Brian Robertson, a gang expert, testified that he was familiar with the Mira Loma Young Crowd. At the time of the attack on Chavez, there were six members. The Brazil Market was considered within the gang's "turf." The corporal testified about gangs in general. He also testified that "pack crimes" involve a victim being attacked by a group, and any person who comes to the victim's aid is also likely to be attacked. This intimidates others from intervening. Corporal Robertson opined that the Urbana Street attack and the attack on Chavez were committed for the benefit of a street gang, namely, sending a message to the victim, witnesses, and the community in general. Both defendants had gang-related tattoos on their faces, necks and hands. Both defendants admitted being members of the Mira Loma Young Crowd. Defendant Galvan's moniker is "Sneaky," and defendant Zaiza's moniker is "Grumpy." Defendant Zaiza was convicted of voluntary manslaughter in 1996.

C. The Defense

John Robles, a defense investigator for defendant Zaiza, testified that he showed Lobato copies of the photographic lineups and that Lobato was unable to identify either defendant as being one of the men he saw assault Chavez at the Brazil Market.

D. Rebuttal

Detective Holland testified that it is not uncommon for a witness to be initially unable to identify a suspect from a photograph but later be able to identify them in person. The available photographs may be old booking photographs or Department of

Motor Vehicle photographs, which may not depict the suspect in the same way as he or she appeared when the witness observed the incident.

II. SUFFICIENCY OF EVIDENCE

Defendants challenge the sufficiency of the evidence to support their convictions for attempted murder and torture, contending there was insufficient evidence of their intent to kill, or premeditation and deliberation, and of the specific intent to torture.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]' [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Reversal is warranted only where it clearly appears that "upon no hypothesis whatever is there sufficient substantial evidence" to support the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The same standard of review applies when a conviction rests on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).)

A. Attempted Murder

A murder that is willful, premeditated and deliberate is murder of the first degree (§ 189) and is punishable, at minimum, by imprisonment in the state prison for 25 years to life (§ 190, subd. (a)). Attempted murder is not divided into degrees (*People v. Smith* (2005) 37 Cal.4th 733, 740), but an attempted murder that is willful, premeditated, and deliberate is punishable by an indeterminate term of life in prison (§ 664).

As applied to murder and attempted murder, "'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.) A murder or attempted murder is "premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*).)

"Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 603.) "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." (*People v. Thomas* (1945) 25 Cal.2d 880, 900; accord, *People v. Stitely*, *supra*, 35 Cal.4th at p. 543.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our state Supreme Court "surveyed a number of prior cases involving the sufficiency of the evidence to support

findings of premeditation and deliberation." (*Perez*, *supra*, 2 Cal.4th at p. 1125.) From the cases surveyed, the court identified types or categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. (*Ibid*.) The *Anderson* court concluded that courts typically sustain premeditation and deliberation findings "'when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).'" (*Perez, supra*, at p. 1125, quoting *Anderson*, *supra*, at p. 27.)

Stated another way, courts have found sufficient evidence of premeditation and deliberation when "'(1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 172 (*Tafoya*).) These are not the exclusive means of establishing premeditation and deliberation, however. (*Ibid*.) The goal of *Anderson* was not to establish bright-line rules, but to aid reviewing courts in assessing whether the evidence supports an inference that the killing was the result of "'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.'" (*Anderson*, *supra*, 70 Cal.2d at p. 27.)

Thus, "'an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite

little or no evidence of planning and motive.'" (*Tafoya*, *supra*, 42 Cal.4th at p. 172, quoting *People v. Lenart* (2004) 32 Cal.4th 1107, 1127.) Indeed, the three categories of evidence planning activity, motive, and manner of killing "need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.]" (*Stitely*, *supra*, 35 Cal.4th at p. 543.) Still, when all three categories of evidence are present, the finding of premeditation and deliberation will generally be sustained. (*Ibid*.)

Defendant Galvan claims the "beating of Chavez was a random, explosion of violence committed by 'enraged' attackers and resulting in the infliction of multiple brutal injuries." Defendant Zaiza claims there was no intent and Chavez "was, as police stated[,] a victim of a random assault." To support their arguments, they cite the absence of any statements indicative of an intent to kill before or after the incident, the absence of any prior relationship with Chavez, and the evidence that the attack on Chavez commenced only when he intervened to help Lobato. Pointing to the evidence, which shows that the defendants moved from one victim to another, defendants argue that the manner of the attack shows an absence of planning and motive. We disagree.

In this case, the jury not only found there was a specific intent to kill Chavez but also concluded the attempted murder was "willful, deliberate, and premeditated" within the meaning of section 664, subdivision (a). Our review of the record discloses sufficient, credible evidence from which the jury could reasonably conclude defendants specifically intended to kill Chavez and they attempted to murder him in a manner that

was premeditated and deliberate. Most significantly, the evidence demonstrated defendants had a motive to kill. Defendants were members of the Mira Loma Young Crowd. The Brazil Market was considered within Mira Loma Young Crowd's turf. According to the gang expert, gang members fight in front of others to increase their respect. They choose fights with unfair odds (pack crime) to increase their chance of winning. They will attack anyone who comes to the aid of a victim in order to intimidate others from intervening.

Here, a pack of three or four gang members was involved in a fight against one man. When Lobato came to his aid, they turned on Lobato. When Chavez came to the aid of Lobato, Chavez was attacked. Neither Lobato nor Chavez did anything to provoke defendants other than try to intervene in an attack. This attack was gang members asserting their power over their turf. The fact that they attacked in a pack shows planning. At no point did either defendant engage in a one-on-one fight. Why? Because that was never the plan. Moreover, instead of simply hitting Chavez once, defendants repeatedly struck and kicked him in the head and did not stop until he was unconscious, bleeding and comatose—in other words, until he appeared to be dead. But for medical intervention, Chavez would have died. From this evidence, the jury could reasonably infer that defendants intended to kill Chavez, had the motive to do so (pack crime in gang turf to show dominion), and had sufficient time between beating each prior victim to reflect and weigh their actions.

B. Torture

The crime of torture is defined in section 206. That statute provides: "'Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in [s]ection 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.' 'As the statute states, torture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.' [Citation.]" (*People v. Pre* (2004) 117 Cal.App.4th 413, 419.)

Defendants contend there was no evidence that their attack of Chavez was "prolonged, or that any of the beating was inflicted for the purpose of experiencing pleasure, or for revenge, extortion or persuasion." Rather, they claim the attack was merely "an explosion of violence, with the sole provocation being Chavez's presence in the store and his interruption of the assault upon . . . Lobato." Thus, defendants argue that their conviction of torture should be reversed for insufficient evidence. We disagree.

Although the severity of a victim's injuries is not necessarily determinative of the perpetrator's intent to torture, it does not follow that "the nature of the victim's wounds cannot as a matter of law be probative of intent. Intent is a state of mind. A defendant's state of mind must, in the absence of the defendant's own statements, be established by the circumstances surrounding the commission of the offense. [Citation.] The condition

of the victim's body may establish circumstantial evidence of the requisite intent." (*People v. Mincey* (1992) 2 Cal.4th 408, 433.)

Here, as the People point out, it is uncontested that defendants inflicted great bodily injury upon Chavez. As for their intent, the jury had ample basis to infer that the defendants intended to inflict cruel and severe pain on Chavez. Defendants did not know Chavez and Chavez did nothing to provoke that attack other than ask that they stop beating Lobato. Defendants responded by viciously and deliberately beating and kicking Chavez's head and face numerous times while he lay helpless on the ground. Chavez was outnumbered with no opportunity to defend himself. Defendants continued their attack until Chavez was unconscious in a pool of his own blood. With the exception of some bruising on Chavez's side and shoulder, most of his injuries were to his face and head. When Chavez arrived at the hospital, he was unresponsive. He had a seizure while being transported and another upon arrival. The attack left Chavez in a coma for more than a week. He was hospitalized for several weeks. An attack this savage and deliberate cannot necessarily be explained or excused as "an explosion of violence." Rather, the jury could have reasonably inferred that this was a deliberate and cruel attack, intended to inflict extreme pain, suffering, and damage.

III. DETECTIVE HOLLAND'S TESTIMONY

Detective Holland was recalled as a rebuttal witness by the prosecution. Over defense objection, he was allowed to testify about his experience in investigations with witness identifications. He testified that he had been a law enforcement officer for

almost 16 years and had investigated numerous crimes involving witness identifications. He opined that it was not uncommon for a witness to be able to identify a person in court, even if the witness was unable to identify the person earlier from photographs. He also opined that it is easier to identify someone when he or she is seen in person. Noting that still photographic lineups are usually earlier booking photographs or Department of Motor Vehicle photographs, and that suspects may have changed their appearances since the photographs were taken, the detective stated that a witness may not be able to identify a suspect from a photograph.

On appeal, defendant Zaiza contends the detective's testimony on rebuttal concerning photographic lineups was inadmissible because it was not a proper lay opinion under Evidence Code section 800, nor was it a proper expert opinion under Evidence Code section 720. He argues that the admission of Detective Holland's testimony amounted to an abuse of discretion, which resulted in depriving him of his constitutional right to due process of law.

As with other evidentiary rulings, we review the trial court's ruling for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 508-509; *People v. McDonald* (1984) 37 Cal.3d 351, 376, overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) "'[T]he decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion' and . . . such evidence 'will not often be needed.' [Citation.]" (*People v. Sanders*, *supra*, at pp. 508-509.) Expert testimony is needed

"'[w]hen an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury . . . .' [Citation.]" (*Id.* at p. 508.)

To begin with, we find no abuse of discretion in the trial court's decision to allow Detective Holland to testify as an expert witness on the subject of witness identifications and photographic lineups. The detective's testimony was based on his years of experience in conducting investigations for numerous crimes involving witness identifications. "'For one to be competent to testify as an expert he must have acquired such special knowledge of the subject matter about which he is to testify, either by study or by practical experience, that he can give the trier of fact assistance and guidance in solving a problem for which his own good judgment and average knowledge is inadequate. [Citations.] Where the witness discloses special knowledge of the subject on which he undertakes to give his opinion as an expert, the question of the degree of his knowledge goes to the weight of his testimony rather than to its admissibility. [Citations.]' [Citation.]" (*People v. Brown* (1991) 234 Cal.App.3d 918, 938-939.)

Here, Detective Holland had sufficient training and experience to qualify as an expert on the subject of investigations with witness identifications. While courts ordinarily "should not admit expert opinion testimony on topics so common that persons

of '"ordinary education could reach a conclusion as intelligently as the witness"' [citations], experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. [Citation.] '[I]f that [total ignorance] were the test, little expert opinion testimony would ever be heard.' [Citation.] [¶] Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury. [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.) While jurors are equipped to evaluate witnesses' identifications of a defendant based on photographs or in person, it may help them to learn from a person with extensive experience in investigations involving witness identifications whether discrepancies in identification are common, and why they are. In this case, some of the witnesses identified defendants using photographs, while others identified them at trial in person. Given these discrepancies, we cannot conclude that the testimony of Detective Holland was of no assistance to jurors who have no experience in witness identification, nor can we conclude that the detective's testimony "'"would add nothing at all to the jury's common fund of information."' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 163.) Thus, we find that the trial court was within its discretion in allowing Detective Holland to give the expert opinion testimony that was elicited.

Notwithstanding the above, this is not a case in which the eyewitness identification was uncorroborated by other evidence giving it independent credibility: At trial, Lobato's in-court identification of defendants was unequivocal. Ladino told the deputies that one of the defendants lived at 14519 Chandler. Ladino identified

defendants as the perpetrators of these crimes from a photographic lineup. Defendant Galvan admitted being at the Brazil Market at the time of the attack. As the People point out, a defendant need not be identified positively and without inconsistency as the perpetrator of the crime. (*People v. West* (1984) 154 Cal.App.3d 100, 105-106.) Whether or not a witness has accurately identified a defendant as the suspect is a question of fact for the jury to decide. Such was the case here. Accordingly, we perceive no error in the admission of Detective Holland's testimony.

Even if we were to find error, we conclude that such error was harmless because it is not reasonably probable that a result more favorable to defendant Zaiza would have been reached in the absence of any erroneous inclusion. As we noted above, there was independent corroborating evidence. Moreover, defense counsel extensively cross-examined each witness regarding his identification of defendants. In closing argument, counsel warned the jurors of the potential unreliability of the witnesses' identification and argued the weaknesses and pitfalls of their identification. Furthermore, the trial court instructed the jury to consider several factors in evaluating eyewitness testimony.

IV. AMENDMENT OF INFORMATION

Defendants were charged with attempted murder, aggravated mayhem (count 2), burglary, and active participation in a criminal street gang. Following the preliminary hearing, the magistrate held defendants to answer on all of the charges and allegations with the exception of the aggravated mayhem charge. The magistrate found insufficient evidence of the specific intent to permanently disable, disfigure, or deprive the other

person of a limb, organ or other member of his body. The prosecution filed an information charging defendants with the four counts and allegations, including the aggravated mayhem charge in count 2. Defendants moved to dismiss count 2 under section 995. The trial court granted the motion.[7] On May 31, 2006, the prosecution submitted an amended information charging defendants with torture. (§ 206.) Defendants moved to dismiss the torture charge under section 995. The trial court denied the motion, finding sufficient evidence to support the torture charge. On appeal, defendant Zaiza contends the trial court abused its discretion and violated his due process rights by allowing such amendment.

Following the preliminary hearing, the prosecution "may charge the defendant with . . . any offense or offenses shown by the evidence taken before the magistrate to have been committed." (§ 739.) Section 1009 authorizes the trial court to "permit an amendment of an . . . information . . . at any stage of the proceedings . . . ." However, an information cannot be amended "so as to charge an offense not shown by the evidence taken at the preliminary examination." (§ 1009; *People v. Superior Court (Mendella)* (1983) 33 Cal.3d 754, 764, superseded by statute on another point as stated in *In re Jovan B.* (1993) 6 Cal.4th 801, 814, fn. 8; *People v. Jones* (1990) 51 Cal.3d 294, 317 ["[d]ue process of law requires that an accused be advised of the charges against him so

[7] Judge Elisabeth Sichel presided over the hearing. Although the reporter's transcript notes the motion was made on behalf of both defendants and granted as to both, the clerk's transcript states that the motion was granted as to defendant Galvan but denied as to defendant Zaiza.

that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial"].) "Whether or not to allow an amendment is within the trial court's discretion, and its ruling will not be reversed absent an abuse of discretion. [Citations.]" (*People v. Villagren* (1980) 106 Cal.App.3d 720, 724.)

Claiming that the attack on Chavez was no more than a random act of violence by a gang for the purpose of intimidating the community, defendant Zaiza argues the evidence presented at the preliminary hearing was insufficient to show a specific intent to cause cruel or extreme pain and suffering for revenge, extortion or persuasion or any sadistic purpose. We disagree. The intent of the perpetrator can be established by the circumstances of the offense, as well as from other circumstantial evidence. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 433; *People v. Jung* (1999) 71 Cal.App.4th 1036, 1041.) At the preliminary hearing, Detective Holland testified that Chavez "had suffered numerous injuries about his head and face and that while being transported to the hospital via ambulance . . . [he] actually died two times on the way." Chavez spent 10 days in intensive care, stayed in another room that provided 24-hour nursing care, spent three days in a regular room, and then two weeks in a rehabilitation center. He is no longer able to run his business because he cannot remember things. Basically, he "cannot function." The attack was described as gang members assaulting several people, one being violently assaulted, seriously injured, ending up in a coma for a week, followed by being in intensive care. Chavez was beaten "within an inch of his life." Further testimony described a similar attack by the same gang, along with the activities of the

gang in general. We find that under the circumstances here, the offense of torture was shown by the testimony. Given the nature of defendants' attack, primarily to Chavez's head, it is reasonable to infer that defendants inflicted great bodily injury "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose . . . ." (§ 206.)

Regarding defendant Zaiza's due process claim, we find no surprise in allowing the amendment to charge torture in place of aggravated mayhem. The theory of the prosecution and the evidence the prosecution proffered at trial was known to the defense from the time of the preliminary hearing, if not from the outset of the proceedings. Regardless of which charge advanced to trial, the defense would have been the same. The trial court thus did not abuse its discretion in concluding there was no prejudice to the defense in amending the pleadings.

V. INFLICTION OF GREAT BODILY INJURY ENHANCEMENT

The prosecution alleged, and the jury found the allegations true, that defendants personally inflicted great bodily injury upon Chavez, which caused him to become comatose due to brain injury within the meaning of section 12022.7, subdivision (b). Section 12022.7, subdivision (b), in relevant part, provides: "Any person who personally inflicts great bodily injury . . . which causes the victim *to become comatose due to brain injury or to suffer paralysis of a permanent nature,* shall be punished by an additional and consecutive term of imprisonment in the state prison for five years." (Italics added.) Thus, based on the jury's true finding, the trial court enhanced each defendant's sentence

on the attempted murder conviction with a five-year sentence. On appeal, defendant Zaiza contends the five-year enhancement is inapplicable because Chavez's comatose condition was not permanent. He argues the trial court misinterpreted the language in the statute.

"'Matters of interpreting and applying a statute are questions of law. [Citations.]' [Citation.] Questions of law are reviewed under the de novo standard of review. [Citation.]" (*People v. Whaley* (2008) 160 Cal.App.4th 779, 792.)

"In interpreting a statute, our objective is 'to ascertain and effectuate legislative intent.' [Citation.] To the extent the language in the statute may be unclear, we look to legislative history and the statutory scheme of which the statute is a part. [Citation.] We consider the entire statutory scheme in interpreting particular provisions 'so that the whole may be harmonized and retain effectiveness.' [Citation.] 'In the end, we "'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]"' [Citation.]" (*People v. Garcia* (2008) 160 Cal.App.4th 124, 131.)

The words at issue are: ". . . *to become comatose due to brain injury or to suffer paralysis of a permanent nature.*" (§ 12022.7, subd. (b), italics added.) According to defendant Zaiza's construction, the phrase "of a permanent nature" modifies both "comatose" and "paralysis." The People disagree, arguing that the phrase "of a

permanent nature" was not intended to modify the word "comatose" but only the word "paralysis," the alternative basis for the enhancement. We agree with the People.

Nothing in section 12022.7, subdivision (b), states or implies that becoming comatose due to brain injury must be of a permanent nature. Defendant Zaiza correctly notes that our colleagues in Division One of this District addressed this issue in *People v. Tokash* (2000) 79 Cal.App.4th 1373, 1378-1379 (*Tokash*), and concluded the same: "We conclude, based on the legislative history of the statute as well as the language employed, that the phrase 'of a permanent nature' was intended to modify only 'paralysis.' First, the evolution of the legislative language after the bill's original introduction, which can offer 'considerable enlightenment as to legislative intent' [citation], confirms the Legislature did not intend to limit the enhancement to victims in permanent comas. Subdivision (b) of section 12022.7 was added by the enactment of Senate Bill No. 529. (Stats. 1993, ch. 607, § 2, p. 3260.) As originally introduced in the Legislature, the subdivision (b) enhancement applied only if the injury caused the victim to 'become clinically brain dead,' connoting a permanent state. [Citation.] During the legislative process, the phrase 'clinically brain dead' was replaced with the word 'comatose.' [Citation.] The change in terminology from brain dead to comatose demonstrated an intent that the enhancement applied even though the victim's comatose condition was not permanent and irreversible.

"Additionally, the floor analysis of Senate Bill No. 529, which we may also consult to construe the legislative intent [citation], confirms the 'permanent nature' language was intended to apply to paralyzed rather than comatose victims. The floor

analysis in the Senate [citation] contained language stating: 'THIS BILL: [¶] . . . [¶] 2) Adds a five year enhancement for intentional infliction of great bodily injury causing the victim to be comatose due to brain injury or suffer permanent paralysis . . . .' [¶] The legislative history convinces us the Legislature intended the word 'permanent' to modify the term 'paralysis' but not the term 'comatose.'" (*Tokash, supra*, 79 Cal.App.4th at pp. 1378-1379, fn. omitted.)[8]

At the time the *Tokash* court reviewed the language in section 12022.7, subdivision (b), that section, in relevant part, provided: "'Any person found to have inflicted great bodily injury . . . which causes the victim *to become comatose due to brain injury or to suffer paralysis, as defined in [s]ection 12022.9, of a permanent nature,* shall be punished by an additional and consecutive term of five years.'" (*Tokash, supra*, 79 Cal.App.4th at p. 1378, italics added [discussing former § 12022.7, subd. (b)].) After the *Tokash* decision, the Legislature amended the language in the section to provide the current language as noted above. Given this amendment, defendant Zaiza argues, "The

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[8] Defendant Zaiza acknowledges the legislative history of the statute, specifically, the decision to use the word "comatose" instead of "clinically brain dead." On October 1, 2007, defendant Zaiza requested this court, pursuant to Evidence Code sections 451, 452 and 459, to take judicial notice of three articles: "1. Encyclopedia of Death and Dying, at www.deathreference.com/B1-Ce/Brain-Death.html[;] 2. Ad Hoc Committee of the Harvard Medical School, 'The Harvard Committee Criteria for Determination of Death.' In *Opposing Viewpoint Sources, Death/Dying*, Vol. 1, St. Paul, MN: Greenhaven Press. 1984'; [and] 3. 'Brain (Stem) Death.' In John Walton, Jeremiah Barondess, and Stephen Lock eds., *The Oxford Medical Companion*, New York: Oxford University Press, 1994."

The People opposed this request by letter brief filed with this court on October 11, 2007. The request for judicial notice is denied. The articles are irrelevant to our resolution of defendant Zaiza's issue.

[L]egislature had the opportunity to clarify its meaning by simply rewriting the statute to state, 'or to suffer permanent paralysis,' but instead kept the modifying 'of a permanent nature' after both provisions. . . . Inasmuch as the ambiguity debate was apparently prompted by the placement of the deleted provision, it can be argued that the [L]egislature's removal of the phrase was done so that the permanency provision would clearly apply to both conditions."

Defendant Zaiza's position would require a finding that the Legislature, in deleting the phrase "*as defined in [s]ection 12022.9*" from the language in section 12022.7, subdivision (b), implied that the phrase "of a permanent nature" would modify "comatose" as well as "paralysis," so that it would have exactly the opposite meaning *Tokash* divined. We disagree. "An implied amendment or repeal of a code section is generally disfavored. [Citation.]" (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1270.) We presume that the Legislature, when enacting a statute, is aware of related code sections and intends to maintain a consistent body of rules. (*Ibid*.) We also presume that the Legislature is aware of judicial interpretations of a statute. "'When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute. [Citation.]' [Citations.]" (*People v. Ledesma* (1997) 16 Cal.4th 90, 100-101.) Absent any direct proof that the Legislature rejected the *Tokash* court's interpretation of section 12022.7, subdivision (b), we conclude that *Tokash* continues to be both viable and

controlling with regards to the interpretation of the phrase "*. . . to become comatose due to brain injury or to suffer paralysis of a permanent nature . . . .*" (§ 12022.7, subd. (b), italics added.)

Moreover, nothing in Assembly Bill No. 2173, enacted in 2002, or its legislative history, indicates the Legislature intended to modify the judicial construction of the statute as stated in *Tokash* to require a permanent comatose state in order to impose the enhancement. According to the legislative history, one of the key issues in the bill was whether "numerous firearm and related injury enhancement sections and subdivisions [should] be rewritten or amended so as to eliminate redundant, superfluous or inconsistent provisions." (Sen. Amend. to Assem. Bill No. 2173 (2001-2002 Reg. Sess. June 11, 2002, <http://info.sen.ca.gov/pub/01-02/bill/asm/ab_2151-2200/ab_2173_cfa_20020618_130757_sen_comm.html> [as of Nov. 17, 2008].) The bill's author argued that the bill is necessary to "eliminate[] certain archaic and redundant statutory phrases." (*Ibid*.) Looking at the final version of section 12022.7, subdivision (b), we note the stated purpose of Assembly Bill No. 2173 accomplished its goal, i.e., the phrase "as defined in [s]ection 12022.9" was eliminated.

Given the above, defendant Zaiza's argument that the 2002 amendment indicates a legislative intent to require a permanent comatose state is without merit. The section 12022.7, subdivision (b), enhancement applies to comatose victims, whether the state of their coma is permanent or not.

VI. CORRECTION OF THE ABSTRACT OF JUDGMENT

Defendant Zaiza contends, and the People concede, that the abstract of judgment erroneously indicates he was convicted of aggravated mayhem (§ 205) per the original charged count instead of torture (§ 206) per the amended information. We therefore order the abstract of judgment to be corrected to properly reflect the crime of which he was convicted. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187-188; *People v. Jenkins* (2001) 86 Cal.App.4th 699, 702, 707-708.)

VII. DISPOSITION

The matter is remanded to the trial court with directions to strike the language which indicates that defendant Zaiza was convicted of aggravated mayhem pursuant to section 205, and replace it with language reflecting that he was convicted of torture pursuant to section 206. The clerk of the superior court is directed to modify the abstract of judgment to reflect these changes and then to forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

KING
J.